

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

Number: **202111012**

Release Date: 3/19/2021

CC:ITA:B03:Boone

POSTU-104261-20

UILC: 165.08-00

date: February 16, 2021

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subject: Application of the § 165(d) TCJA amendment to businesses in the trade or business of gambling

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Does the Tax Cuts and Jobs Act of 2017 (TCJA) amendment to § 165(d) of the Internal Revenue Code apply to a business in the trade or business of gambling, thereby treating its ordinary and necessary business expenses as losses from wagering transactions?

CONCLUSION

The TCJA amendment to section 165(d) does not apply to the ordinary and necessary expenses of a business in the trade or business of gambling.

STATEMENT OF FACTS

You requested advice on whether the TCJA amendment to the deduction for wagering losses under §165(d) applies only to individuals or to any taxpayer involved in the trade or business of gambling, including casinos, as the plain language of the statute does not clearly distinguish between individual gamblers who are in the trade or

business of gambling (professional gamblers) and businesses in the trade or business of gambling.

### LAW AND ANALYSIS

Section 165(a) allows a deduction for any loss sustained during the taxable year and not compensated for by insurance or otherwise. Section 165(c) limits the deduction under § 165(a) to: (1) losses incurred in a trade or business; (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and (3) losses arising from fire, storm, shipwreck, or other casualty, or theft. Section 165(h)(5) limits a personal casualty loss to the extent it is attributable to a federally declared disaster for a taxable year beginning after December 31, 2017, and before January 1, 2026.

Section 165(d) provides that losses from wagering transactions are allowed as deductions only to the extent of the gains from such transactions. See also section 1.165-10 of the Income Tax Regulations.

As amended by section 1305 the TCJA, §165(d) also provides that, for purposes of the preceding sentence, in the case of taxable years beginning after December 31, 2017, and before January 1, 2026, the term “losses from wagering transactions” includes any deduction otherwise allowable under this chapter incurred in carrying on any wagering transaction. The statutory language does not indicate if the amendment applies to all taxpayers or only to individuals.

Prior to the TCJA amendment, case law inconsistently applied the loss limitation of § 165(d) to the expenses incurred by a professional gambler, such as traveling expenses to and from the casino. These cases differed in the treatment of expenses incurred with individual gambling and with operating a business with gaming activities. See, e.g., Commissioner v. Groetzinger, 480 U.S. 23 (1987); Commissioner v. Sullivan, 356 U.S. 27 (1958); Estate of Todisco v. Commissioner, 757 F.2d 1 (1<sup>st</sup> Cir. 1985), *affg.* T.C. Memo. 1983-247; Offutt v. Commissioner, 16 T.C. 1214 (1951); see also Kozma v. Commissioner, T.C. Memo 1986-177; Valenti v. Commissioner, T.C. Memo 1994-483; Kochevar v. Commissioner, T.C. Memo 1995-607.

The Tax Court in Mayo v. Commissioner, 136 T.C. 81 (2011), dealt with individual taxpayers who were professional gamblers. The court acknowledged that the treatment of business expenses as wagering losses was overbroad and did not reflect the ordinary meaning of the words used in the statute. While the phrase “losses from wagering transactions” had not been extensively considered under the case law, the court construed the phrase “gains from such transactions” narrowly to mean proceeds from a wager by the taxpayer where the taxpayer stands to gain or lose on the base of chance. Mayo at 90. The court concluded that the gains and losses from wagering transactions must be the actual product of wagers entered into by the taxpayer, not merely arising in connection with conduct of wagering activities. Mayo at 93. The court concluded that the prior case law interpretation of the phrase including expenses that

were not the result of a wager went beyond the ordinary meaning of the statute. Mayo at 94. The court in Mayo followed this reasoning in holding that losses from wagering transactions do not include trade or business expenses of a professional individual gambler other than the costs of the wager. Id. at 97.

In the TCJA, Congress amended the language of § 165(d), effectively negating the Mayo decision. Under the amendment, for taxable years 2018 through 2025, individual professional gamblers are prohibited from claiming business expenses arising from wagering transactions in excess of gambling gains. In explaining the reason for the change, the Committee Report on TCJA (Report 115-409) by the House Ways and Means Committee states that “[t]he Committee believes that the scope of the limitation on wagering losses should be broadened to cover expenses incurred in the conduct of the *individual’s* gambling activity.” [emp added]. A footnote to the report states, “[t]he provision thus reverses the result reached by the Tax Court in Ronald A. Mayo v. Commissioner, 136 T.C. 81 (2011). In that case, the Court held that a taxpayer’s expenses incurred in the conduct of the trade or business of gambling, other than the cost of wagers, were not limited by sec. 165(d), and were thus deductible under sec. 162(a).”

Nothing in the committee report states an intention to apply the amendment to losses incurred by businesses in the trade or business of gambling. This intent is repeated in the Reconciliation Recommendations (S. PRT. 115-20) by the Senate’s Committee on the Budget, the House Conference Report on TCJA (Report 115-466), and Joint Committee on Taxation’s General Explanation of TCJA (JCS-1-18).

The TCJA amendment to § 165(d) applies only to individuals, as detailed in the legislative history of the amendment and the Mayo case. As a result, individuals are limited in the amount of a deduction for wagering losses, including those expenses incurred in carrying on a wagering activity, to the amount of gains from wagering transactions.

## CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Elizabeth Boone at (202) 317-5100 if you have any further questions.